Livingston, Thomas R. v. Dugan, Jeremiah; Dugan, John; Dugan, Noah George; Dugan, Thomas Cox 1851 Washington 173/5

(8) Replev

Affd ; Testator deemed slave, Tony, perishable property, "D's in Possess", $3.50

Slaves ; Wills

1 State of Missouri } p
Washington County } Be it remembered that on the 7th day of February in the year of our Lord Eighteen hundred and fifty. there was filed in the office of the Clerk of the Circuit Court of Washington County, by Jeremiah Dugan and others against Thomas R. Livingston a petition which is in the words and figures following to wit

Petition Jeremiah Dugan
John Dugan
Thomas C. Dugan by
his Guardian Jeremiah
Dugan and Noah
George Dugan by his
Guardian Jeremiah Dugan
against
Thomas R. Livingston

The petition of the said plaintiffs respectfully sheweth that they are the owners of and are entitled to the immediate possession of a certain negro Slave named Toney aged about ten years, and that the defendant wrongfully detains said Slave from their possession. Said Slave is of the value of four hundred and fifty dollars. M. Frisell atty for plaintiffs

affidavit Washington County Sct

personally appeared before the undersigned Clerk of the Circuit Court Jeremiah Dugan for himself and for and behalf of the other plaintiffs, and makes oath that the facts stated in the foregoing petition are true, and he also further states that the said plaintiffs are the owners of the Slave above described } Jeremiah Dugan

2 Sworn to & subscribed before
me this 7th day of Feby 1850
Wm A. Matthews Clk

upon the filing of said petition a summons and order was issued which is as follows to wit

Washington County Sct

Summs The State of Missouri To
the Sheriff of said County Greeting we command
you that you summon Thomas R. Livingston that
he be and appear before the Judge of our Circuit
Court at a Court to be held at the Court House in
Town of Potosi in & for said County on the second
monday of April next. then and there to answer
the complaint of Jeremiah Dugan. John Dugan
Thomas C. Dugan By his Guardian Jeremiah
Dugan and Noah George Dugan By his Guardian
Jeremiah Dugan & have you then there this writ

Witness William A. Matthews Clerk of our
said Court at office this 7th day of February A.D
1850.
Wm A. Matthews Clerk

order It is ordered by the undersigned Clerk of the Circuit
Court in vacation that the above named defendants
deliver the slave in the above affidavits specified
to the Sheriff of Washington County. and it is
further ordered that if the said slave be not
delivered to the Sheriff in pursuance of the above
order. that the Sheriff take said slave from the
defendants and deliver the same to the plaintiffs

Witness my hand and official seal
at office this 7th day of February A.D. 1850
Wm A. Matthews Clerk

upon which the Sheriff made the following return

Sheffs return to wit Served the within summons on Thomas R
Livingston by reading the within petition order &
summons to the him the said T. R. Livingston

3 in Washington County February 7th 1850. the said T R Levingston has not as yet delivered the within named negro to me L W. Burris Sheriff
and at the April Term of the Circuit Court for said County of Washington. an order was made in said Cause which is as follows

Ans filed
Jeremiah Dugan et al
vs
Thomas R. Levingston
} Answer of Defendant filed

which answer is in the words and figures following to wt

Ans
Jeremiah Dugan
John Dugan
Thomas C Dugan by his
Gdn Jeremiah Dugan &
Noah George Dugan by his
Gdn Jeremiah Dugan
} plff
agt
Thomas R Levingston } Deft

Defendant states that he came in possession of the Negro boy Jeremiah also called Toney by virtue of a Bill of Sale from Catharine Dugan to himself dated 31st of Jany 1850 said Bill of Sale is herewith exhibited. The consideration of his purchase as will be seen was $200- at the time of the purchase defendant supposed that Catharine Dugan had a good title. He is informed that said boy Toney was given to Catharine Dugan by her husband Stephen Dugan when it was an infant, that said Catharine had great trouble in raising the boy because she thought it was her own & that Stephen Dugan often declared that he had given it to his wife Catharine. The said Negro boy was often treated as her seperate property by her husband. he always refusing to sell it

4 saying it was his wife's. after the death of Stephen Dugan the executor Noah Dugan did not inventory the negro as Stephen Dugans. but states that it belonged to Catharine Dugan. defendant states that said plaintiffs being men volunteers and not Creditors cannot be permitted to take away from their mother their seperate property acquired from her husband by his consent. which was always treated as her's by him & by his Exr since his death. Defendant prays that the whole of said slave may be adjudged to be his. Defendant further not waiving his title to the whole says. that in the event the Court should decide that whole slave did never belong to Catharine Dugan he does insist that Catharine Dugan was tenant in common with plaintiffs and Pleasant Manes & Matilda Manes. He states that Stephen Dugan died leaving a wife and wholly omitted in any manner to dispose of said slave. and if said slave was his property at his death. he died intestate as to it & his widow & children are entitled to him share & share alike. The wife of said Stephen Dugan is of record in the proper office in this County & the original is now in his possession he refers to the record as an exhibit. Defendant prays the Court to hear the cause & give him the whole of said slave if he is entitled to it. And if it is considered that he is tenant in common with plaintiffs and Pleasant Manes & wife. he asks the Court to order the negro to be sold & the money distributed

State of Mo } Thomas R. Livingston being
County of Washington } sworn says that he believes the foregoing answer & the matters therein as stated are true. T. R. Livingston

5 Sworn to before me this
30th day of April 1850
Wm A. Matthews Clk
By Sam Harrison DC

and at the same Term to wit the April Term 1850
an order was made in said Cause which is as follows

Manss & wife made Defts — Jeremiah Dugan et al
" Thomas R. Livingston
On Motion Pleasant Manss and wife are made parties defendant in this Cause

said motion is in the words and figures following
Jeremiah Dugan. John Dugan. Thomas C. Dugan by his Gdn Jeremiah Dugan. Noah George Dugan by his Gdn Jeremiah Dugan, plff — agt T R Livingston Defh —

Pleasant Manss & Matilda Manss his wife formerly Matilda Dugan asks leave of the Court to be admitted as a party to this Cause because they say that they are interested in the property in Controversy. their interest shows acquired will be seen upon inspection of the answer which they propose to file. Thos C. Johnson atty

Ans of Manss & wife filed — and on the same day an order was made in said Cause which is in these words

Jeremiah Dugan et al
"
Thomas R. Livingston et al
Answer of Pleasant Manss and wife filed

which answer is in the words & figures following to wit

Ans — Jeremiah Dugan John Dugan Thomas C. Dugan by his Gdn Jeremiah Dugan Noah George Dugan by his Gdn Jeremiah Dugan agt — Thomas R. Livingston & Pleasant Manss & Matilda Manss his wife admitted by the Court as parties

Defendants Pleasant Manss & Matilda Manss for answer say that Matilda

6 Mary is a daughter of Stephen Dugan & sister of plaintiffs that Stephen Dugan died leaving a will but he wholly omitted in his will to dispose of the boy Toney or Jeremiah of whom he died in possession that as to said boy he is considered as dying intestate said defendants say that they are entitled to one fifth of said boy or his proceeds. They pray the Court to fix their right by Judgement & order the boy to be sold for the purpose of partition between plaintiffs themselves & the widow Catharine Dugan

State of Missouri
County of Washington } Pleasant Mary being sworn says that the foregoing answer & the matters therein as stated he believes to be true

Sworn to before me } Pleasant Mary
in open Court Apl
30th 1850
W. A. Matthews Ck

and at the same Term the following order was made

Court Jeremiah Dugan et al
apts
Thos R. Livingston et al } Issue joined and continued

and afterwards to wit at the October Term of the Circuit Court 1850. and on the 18th day of 8br month said cause was submitted to the Court, and the Court gave the following Decision in writing to wit

~~Opinion~~ Decision Jeremiah Dugan et al
vs
Thos R. Livingston et al } October Term 1850
The Court find the following facts in the cause. That at the time of making his will the testator owned the negro boy Jack mentioned in it but which he had sold or disposed of prior to his death which occurred in the early part of January 1843 but did not at the time of making his will

7 owen the boy Toney, but purchased him with his mother between the time of making his will and his death. That the boy Toney was worth $350. at this time. when bought he was an infant and was 2 or 3 years old at the time of Dugans death. is a large likely boy. The administrator failed to put him in the Inventory of Dugans property because he was small. and because attorney had advised him to leave him with the widow The will of Stephen Dugan decd was admitted to probate 7th February 1843. The Court from these facts and placing a construction on the whole will find that the Testator had made as it believed full provision for his widow and daughter Matilda, and having done so. it was not his intention to die intestate as to the boy Toney That such being the intention. and the testator having excepted his boy Jack from the disposition of perishable property, gave a sense & meaning to the term "perishable property" which includes the slave in controversy. and passed the right to the plaintiff Jno H. Stone

and thereupon a Judgement was entered which is in the words and figures following to wit

Jeremiah Dugan. John Dugan
Thomas C. Dugan by his Guardian
Jeremiah Dugan and Noah George
Dugan by his Guardian Jeremiah Dugan
against
Thomas R. Livingston & Pleasant
Maney & Matilda his wife

Judgt

Now at this day come the parties by their respective attorneys. and neither party requiring a Jury. all and singular the premises were by them submitted to the Court. and the court after hearing the evidence. and arguments of Counsel. and being now fully advised

8 of and concerning the premises do find the issue for the plaintiffs. Therefore It is considered by the Court that the plaintiffs have and recover of the said defendants the said Negro Boy Slave named Toney in the plaintiffs declaration mentioned. and in default thereof. It is considered by the Court that the plaintiffs have and recover of the said defendants the sum of three hundred and fifty Dollars damages. being the value of the said Slave and also their Costs and Charges in this behalf expended. and that they have thereof their writ of execution.

And thereupon the defendant by his attorney filed his motion for a new trial. which is in the words & figures following to wit

Mo for new trial

Jeremiah Dugan et al
vs
T R. Livingston et al

The defendant moves the Court for a review & new trial in this Cause for the following reasons

1 The Court refused proper instructions offered & asked by deft. 2 The finding is against law 3 The finding is against evidence & both law & evidence 4 and on this motion defendant makes a case Contained in the evidence embodied in the bill of exceptions

Thos C. Johnson attos

an order was made in said Cause overruling said motion & Bill of exceptions filed which is in the words & figures following

mo overruled

Jeremiah Dugan et al
vs
Thos R. Livingston et al

Now at this day come the defendant by his attorney and moved the Court to grant him a new trial in this Cause and filed his reasons. which being Submitted to the Court. and the Court being fully advised in the premises. It is Considered by the Court that the same be overruled. and thereupon the

9 defendants by his attorney filed his bill of exceptions which Bill of exceptions is in the words & figures following to wit

Bill Ex Jeremiah Dugan
John Dugan et al
vs
Thos R. Livingston et al

Be it remembered that on the trial of this cause the plaintiffs to sustain the issue on their part offered the following evidence
The will of Stephen Dugan dated 17th Sept 1839.
which is as follows

will In the name of God amen. Know by these presents that I Stephen Dugan of Washington County & State of Missouri. being in my sight sound mind after giving my Soul to God in heaven. wishes after my death my will & testament to be fulfill on earth. as below mentioned
1st my wife Catharine will enjoy the use of my place where I now live in Richwoods Township County and State aforesaid Containing about four hundred & forty acres more or less for as long as she remains a widow
2d my wife Catharine will be also entitled to as much of my Stock as will do for the support of my four children and herself. that is to say Jerry. John. Thomas Cop & Noah George. the said Stock will go to my four children. with their increase. after the death or marriage of my said wife. 3d All the balance of my perishable property excepting my Negro Boy Jack. will have to be sold according to law & the proceed from it equally divided amongst my four first mentioned children. that is for their own use, to School them & them after they are of age divided equally
4th my Negro Boy Jack is to be hired out unless my youngest boy N. George becomes of age & then

10 he will be sold & the money divided equally between my four Children. the wages of the boy will also be for their use.

5th that I give to my daughter Matilda five dollars Cash out of my estate

6th after my wife Catharines death or marriage all my land I have first mention is to be divided equally amongst my four Children. Jerry, John, Thomas Cox & Noah George

7th That I appoint and wish Mr Philip Munday & Charles Rouzie to be the administrators on my estate and see to the fulfilment of my will and testament in full. given under my hand and seal in the year of our Lord. one thousand eight hundred and thirty nine this 17th September 1839.

in presence signed & delivered — Stephen his + mark Dugan Seal

Noah Dugan
Chs Rouzie
Phillips Munday

State of Missouri
Washington County } Be it remembered that on the Seventh day of February in the year of our Lord Eighteen hundred and forty three personally appeared before the undersigned Clerk of the County Court within and for Washington County and State of Missouri the within named Noah Dugan and Phillips Munday two of the subscribing witnesses to the foregoing will, and made oath that Stephen Dugan the Testator signed published and declared the annexed writing to be his last will and testament and that he was of sound and disposing mind and that they severally subscribed their names thereto in the presence and at the request of said Stephen Dugan. In Testimony whereof I have hereunto set

11 my hand and affixed the seal of office at
office in Potosi this seventh day of February 1843
Sam Harrison Clerk

State of Missouri } ss
Washington County } I Samuel Harrison Clerk of
the County Court within and for the County and
State aforesaid hereby certify that the foregoing will
and testament of Stephen Dugan was filed for
Record on the seventh day of February 1843. and
is duly recorded in my office
In witness whereof I hereto set my hand
and Seal of office at office in Potosi
Sam Harrison Clerk

Pltffs Evidence They then proved that Stephen Dugan died in January 1843. that the Negro Boy Toney in Controversy was acquired by Stephen Dugan about 18 months before his death & was at that time about three months old. that at the date of the will Stephen Dugan owned but one Slave & that was the Boy Jack. that besides he owned Cattle horses hogs. Sheep Oxen &c. that after the date of the will he acquired a woman and child from Wickersow which together with the boy Jack he sold He then purchased another woman & child that he sold the woman & kept the child & this child was the boy Toney. at the time of his death he owned only the boy Toney. that Stephen Dugan had five Children to wit the 4 parties plaintiff & Malinda, Mamp wife of Pleasant Mamp & that Catharine Dugan a his widow. That Toney was worth $350—

Defts evidence The Defendant to sustain the issue on his part offered the bill of Sale from Catharine Dugan to himself as follows to wit— State of Missouri

Bill of Sale Washington County. January 31st 1850. Know all men by these presence that I Catharine Dugan of

12 the County of Washington and State aforesaid have this day bargained and sold. and by these presents do bargain sell and deliver to T R. Livingston of the State and County aforesaid one Negro boy about two years of age named Jeremiah for and in Consideration of two hundred dollars to me the said Catharine Dugan in hand paid by the said T R. Livingston the receipt whereof is hereby acknowledged. Also I the said Catharine Dugan warrant and defend the title of said boy to the said Livingston from my heirs executors and assigns forever. Signed sealed and delivered in the presence of Joseph Gregory & George Hull this day and date above written

Joseph Gregory — Catharine her + mark Dugan
George Hull

and this was all the evidence offered on either side to sustain the issue on their part

Thereupon the defendants asked the following instructions to wit

Deft Instructions — Jeremiah Dugan et al v T R. Livingston et al } The Defendants asks the Court to instruct itself as follows

Given — 1st That the intention of a testator is always to govern & where that intention can be discovered by reference to extrinsic circumstances, it will govern in the construction of a will

Given — 2. That where a testator uses the term "perishable property" it is to be understood of such personal property as are liable to be wasted or perish in the using. and Slaves are not included under that term unless it be manifestly necessary to effectuate the intention of the Testator.

3 That the Terms of a will will not be

Harvard Law School Library

enlarged unless it be necessary to effectuate the
13 - intention of the Testator and such enlargements
Given will never be made when it works a construction
besides the intent

4. If the Court find that the only Slave the
Testator had at the date of will, is expressly excepted
Refused from the operation of the term "perishable property"
in the third clause of Stephen Dugan's will. that
this is evidence that said testator did not intend
that Slaves should be included under that term

5. That unless the Court find that there was a
plain & manifest intention to affect the Slave Toney
under the general Designation of "perishable property"
Refused it will find for defendant. If it find that he did
not own Tony at the date of the will but only
the boy Jack, then to make this Term cover this
subsequently acquired Slave would be contrary to
the testator's intent & be in fact making a will
for him

6. If the Slave Toney is not disposed of in the
will. then Stephen Dugan died intestate as to
said Slave & he belongs to the children & widow
of said Stephen share & share alike

Johnson.

but the Court refused the 4th & fifth to which
refusal he objects & excepts

Thereupon the Court entered the following Verdict
& Judgement, which is correctly copied on page
7 of this Transcript"

The defendant files his motion & reasons
for a review of this Cause but the motion is
overruled, which motion and order overruling
the same is copied on page 8 of this Transcript

Thereupon the defendant asks the Court
to perpetuate the evidence & proceedings in this

14 Cause & make the same a part of the record in this Cause which is here done

John H. Stone Seal

and afterwards in vacation on the 16th day of December 1850, the Defendant Thos R. Sevingston, filed his bond with good and sufficient Security in the sum of fifty Dollars. and an application for an appeal at the same time

and thereupon the appeal was granted and an order made which is as follows to wit

Appeal granted

State of Missouri } In Vacation
Washington County } December 16th 1850

Now at this day come the Defendants Thomas R. Sevingston and filed his bond in the sum of fifty Dollars. and prayed an appeal from the decision and determination of the Court in this Cause. to the Supreme Court. which is granted by the undersigned Clerk

W. A. Matthews
Clerk

State of Missouri }
Washington County } I William A. Matthews Clerk of the Circuit Court in and for the County aforesaid. hereby certify that the foregoing 14 pages contain a true and perfect Transcript of the Record and proceeding had in the Case wherein Thomas R. Sevingston et al are appellants and Jeremiah Dugan et al are appellees. as fully as the same remains of Record and on file in my office

In Testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at office in Potosi this 9th day of January 1857.

W. A. Matthews. Clerk

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Bill of Costs

W. A. Matthews Clerk	$8,25
Same for this Transcript	5,40
L. W. Burns Sheriff	1,50
S. A. Reyburn Do	2,20
Noah Dugan witness	3,00
W. L. Wilcox "	2,90
	$23,25

I acknowledge notice of the appeal to the Supreme Court in this cause
Feb 24th 1857

M Frisell atty for Appellees

Oct. T. 1857

Appeal from Washington Co.

Jeremiah Dugan et al
Respondent

agt.

Thomas R. Livingston et al
Appellants.

Thurston for Appellants
Frisell for Respondents

Filed March 7. 1857
W. B. Starks Clk

Washington

Jeremiah Dugan et al } Respondents
vs.
Tho. R. Livingston } Appellant

Appeal from Washington County

In the Supreme Court
St Louis
March T. 1851.

And now at this day comes the appellant by his Attorney and says that in the record & proceedings & judgement of the above entitled cause there is manifest error in this that the judgement is for the Respondents when by the law of the land it should have been for the appellant. For this error which will appear upon examination the appellant prays that the judgment aforesaid may be reversed & held for nought

Tho. C. Johnson
Atto for Appellant

15

Jeremiah Dugan et al (Respondents)
agt.
Thomas R. Livingston (Appellant)

Assignment of error.
Thos. J. Johnson
for Appellant

Filed 22nd Oct. 1851
Wm. B. Starke Clerk by
Wm. F. Glanville D.C.

Livingston & others

against

P. Dugan & others

The defendant in error by his attorney comes and says that there is no error in the record & and proceedings and in the judgment as the said plaintiff hath above alledged and this &c

Frissell atty for Appellees Dugan & others

1.5

Livingston & others
against
Dugan & others

Joinder in error

Filed 23d Oct. 1851
Wm S Glanville
Clerk.

Lligans vs Livingston

Jere, John, Thomas Cox and Noah George Lligan brought their suit in the Circuit Court of Washington County against Thomas R. Livingston. The plaintiffs were children of Stephen Lligan deceased, and the suit was for a negro boy named Joney. The defendant claimed under Catharine Lligan, the widow of said Stephen Lligan deceased one sixth part of said negro. Matilda Manes and her husband Pleasant Manes on their application were made parties to the suit and filed their answer claiming one sixth or child's part of said slave —

The following facts appear by the ~~statement~~ record: Stephen Lligan made his Will on 17th September 1839 and died in January 1843. At the date of his will, he owned but one slave, and that was the boy Jack mentioned in the Will, he also owned cattle horses, hogs, sheep oxen &c — That after the date of the Will, he acquired a negro woman and child, which with the boy Jack he sold. He then purchased an other woman and child; that he sold the woman and kept the child, and this child is the boy Joney sued for — That Stephen Lligan left

five children, the four sons the plaintiffs, and Matilda Maness, and that Catharine Dugan is his widow — The will of Stephen Dugan is as follows, leaving out the formal commencement —

1st — My wife Catharine "will enjoy the use of my place, where I now "live in Richwood Township County and State "aforesaid, containing about four hundred and "forty acres more or less for as long as she "remains a widow —

2nd My wife Catharine will be also entitled "to as much of the Stock as will do for the sup "port of my four children and herself, that is "to say Jerry, John, Thomas Cox and Noah George "the said Stock will go to my four children "with their increase after the death or mar "riage of my said wife.

"3rd All the balance of my perishable prop "erty excepting my negro boy Jack will "have to be sold according to law and the proceeds "from it equally divided amongst my four "first mentioned children, that is for their own "use, to school them and then after they are of "age divided equally. —

4th - My negro boy Jack is to be hired out, until
" my youngest boy N. George becomes of age and then
" he will be sold and the money divided equally
" between my four children, the wages of the
" boy will also be for their use.

5th - That I give to my daughter Matilda
" five dollars cash out of my estate.

6th - After my wife Catharine's death or
" marriage, all my land and farm first men-
" -tioned is to be divided equally amongst my
" four children Jerry, John, Thomas Cox and Noah
" George —

7th Appoints Executors - Signed and
sealed 17th September 1839 -

The question in this case is, did Stephen Dugan
die intestate as to the boy Toney; and if so
will Toney be long ~~divided~~ equally ~~[illegible]~~ to all the
children and the widow, or whether he passed
to the plaintiffs in the 3rd Clause of the Will
under the terms "perishable property", and so
would belong to the four boys in exclusion
of the widow and the daughter? The
plaintiffs maintain the latter proposition and

the defendants the former - Several instructions concerning the construction and rules for interpreting wills were asked by the defendants, some of which were given and others refused. but as the will must be construed by this Court, it is not necessary to insert here the instructions -

The case was tried by the Court, and verdict and judgment given for the plaintiffs - The defendants moved for a review and new trial which was overruled and the case comes now before us by appeal -

Nothing is said about the right or ability of the plaintiffs to maintain this action or about the settlement of Dugan's Estate finally, or the payment of his debts - These matters were not brought before the consideration of the Court below, nor will this Court notice them further.

The words "perishable property" are not generally used in our legislation, as including slaves; "personal property" is the phrase generally intended to embrace them, when they are not otherwise mentioned expressly as "slaves" or "negroes" - See the

Acts concerning Administrators and Executors in 1835 and 1845, passim - But in the will before us, it is plain, that the testator supposed that these words "perishable property" did include and embrace his negro; for he expressly excepts "Jack" the only slave he then owned from the operation of the 3rd clause of his will, by which he directs, that "All the balance of my perishable property excepting my negro boy Jack, will have to be sold according to law" H - Now the exception of the negro boy Jack in this clause forces on my mind irresistibly, the meaning that the testator gave to the words perishable property; He believed that the negro Jack would be included under these words, and therefore he excepts him from their operation - Nor is there any positive legal violation in thus giving this meaning to these words - This then being the testators understanding of the words perishable

property," will be adopted by this Court in construing the Will, "without resorting to Lexicographers to determine what the same words, may mean in the abstract; or to adjudicated cases to discover what they have been decided to mean under different circumstances" See Carnagy & Wife vs Woodstock and Mackey 2. Munford. 239-

It is not the opinion of this Court that the boy Joney can be made to take the place of Jack and be disposed of under the Will as Jack would have been, had he remained the Testator's at his death instead of Joney: Nor do we consider that the Testator died intestate as to the boy Joney- Having made his Will it would be with great reluctance, that the Courts would declare he died intestate as to any property, that can be reasonably included under the provisions

and by the terms of the will - according to our understanding of the use of the words "perishable property" made by the testator in this will, the negro boy Toney passed with the perishable property to his four sons the plaintiffs -

This being the construction placed upon the will by the Court below, we see no cause to reverse the judgment - The other judges of the Court concurring, the judgment below is affirmed

John F Ryland

15

Dugans
vs
Livingston

Opinion by Ryland

Filed November 4th 1851
Wm J Glanville
Clerk.

Jerry, John, Thomas Cox, & Noah George Dugan
a.g.t.
Thomas R. Livingston

Suit for delivery of a slave named Toney
Appeal from Washington County.

This was a suit brought by the plaintiffs who were children of Stephen Dugan dec^d for a negro boy named Toney. The defendant claimed under Catharine Dugan widow of Stephen Dugan one sixth part of said slave. Matilda Manes & her husband Pleasant Manes on their application were made parties to the suit and filed their answer claiming a sixth or childs part of said slave. The facts are as follows Stephen Dugan made his will on the 17th Sept. 1839 and died in January 1843. At the date of his will he owned but one slave and that was the boy Jack mentioned in the will - that besides he owned cattle horses, hogs, sheep, oxen &c, that after the date of the will he acquired a woman & child which together with the boy Jack he sold - He then purchased another woman & child - that he sold the woman & kept the child & this child was the boy Toney sued for - that Stephen Dugan left 5 children the parties plaintiff & Matilda Manes & that Catharine Dugan is his widow. The will of Stephen Dugan is as follows leaving out preleminaries

"1st My wife Catharine will enjoy the use of my place where I now live in Richwoods Township County & State aforesaid containing about four hundred and forty acres more or less for as long as she remains a widow

2nd My wife Catharine will be also entitled to as much of the stock as will do for the support of my four children and herself that is to say Jerry

John, Thomas Cox and Noah George the said Stock will go to my four children with their increase after the death or marriage of my said wife

3rd All the balance of my perishable property excepting my negro boy Jack will have to be sold according to law & the proceeds from it equally divided amongst my four first mentioned children that is for their own use to school them & then after they are of age divided equally.

4. My negro boy Jack is to be hired out untill my youngest boy N. George becomes of age & then he will be sold and the money divided equally betwen my four children the wages of the boy will also be for their use.

5. That I give to my daughter Matilda five dollars cash out of my estate

6th After my wife Catharine death or marriage all my land and farm first mentioned is to be devided equally amongst my four children Jerry, John Thomas Cox & Noah George

7th Appoints executor.

Signed Sealed 17th Sept 1839.

The question which arose in this case was whether Stephen Sugaw died intestate as to the boy Toney and if so he would be divided equally between all the "children & the widow; or whether he passed to the plaintiffs in the 3rd clause of the will under the terms "perishable property" & so would belong to the 4 boys to the exclusion of the widow & the daughter The plaintiffs maintained the latter proposition & the defendants the former. Several instructions were asked by defendants some given & some refused upon the rules for interpreting wills, but as this court must construe the will it is unnecessary to copy them.

The case was tried by the court & a verdict & judgement for the plaintiffs. The facts appear both in the judgement of the court & in the bill of exceptions. The defendants moved for a review & new trial which was overruled & he appealed to this court.

Thos. L. Johnson Atto
for Levingston (Appellant)

Dugan's agt. Levingston } pltffs. (Respondents here)
} deft. (Appellants here)

Points & Authorities

It is insisted that the boy Toney did not pass to the plaintiffs under the 3rd clause of Stephen Dugan's will, but as to him Stephen Dugan died intestate.

The operative words in that clause ~~under~~ on which the plaintiffs found their claim are "perishable property". This term is defined under our law as meaning such property as is liable to perish, be consumed or rendered worse by keeping. Compare § 33 & 34 Art II Title Administration. Perishable property the admr must sell to the highest bidder soon after filing his inventory first giving three weeks notice. If this be not sufficient to pay debts he may in the same manner sell other personal estate disposing of slaves last § 34. Thus while the statute recognizes slaves as personal property it clearly distinguishes them from "perishable property." All perishable property is personal property but it is not true ê converso that all personal property is perishable property. The law says that the admr at his first sale shall sell the perishable property; was it ever heard

that he could sell slaves. He must exhaust all other personal property first even chattels real & public stocks before he can touch slaves. It is expressly said slaves shall be disposed of last §34. Slaves are a peculiar and distinctive kind of property. They possess a value independant of their value in market. There is a pretium affectionis. It was held by this court in the case of Rennick v. Chalon 7 M.R. 197 that an act of the Kentucky Legislature authorizing individuals to dispose of their chattels by will did not authorize them to liberate slaves the court presuming that when the Legislature designed to embrace slaves in the provisions of a law they would do so eo nomine and not under the general designation of chattels. This court also in the case of Clark Swift v. Henry's adm^r 9 Mo Rep 345 say that the intention to affect slaves by will even under the general designation of personalty should appear manifest & plain before a court could give such language so broad an interpretation. Now it is a rule of construction applicable to every written instrument that wherever a word is used which has a fixed & well defined meaning, it shall be presumed that it is used in that sense Brooms Legal Maxims p. 124. But here the case is stronger than the rule for the common & legal meaning of the words perishable property is the same. & that meaning is such property as is liable to perish, be consumed, or rendered worse by keeping. In the absence of any proof of intention to do so, it is submitted confidently that this court will not adjudge slaves to pass under the words "perishable property".

2. Again. In construing a will the intention of the testator is the pole star by which the court should be guided provided no rule of law is thereby infringed. Brooms Legal Maxims p. 122. 4th Kent's Com.

p. 534. Now the evidence shows that when this will was made, Stephen Dagan did not own the child Toney and that the only slave he owned was the boy Jack. The boy Jack is expressly excepted from the operation of the 3rd clause in the will but is disposed of in the 4th clause. It is clear therefore that the testator never intended to dispose of any slave under that third clause. In the 2nd he provided that his wife should be entitled to as much of the stock as will do for the support of herself & his four children Jerry, John, Thomas Cox, & Noah George, and after her death or marriage the stock with its increase was to go to his four said children. He then says in the 3rd clause all the balance of my perishable property &c. What balance? A balance supposes a whole something taken away. Here the stock is referred to as the whole, - so much is to be taken away as will do for the support of his wife and the four boys and the balance of his perishable property (that is the balance of the stock before referred to & from which he gave off to his wife & boys) is to be sold and the proceeds divided among them for educational purposes. Now it would seem, if the testator [redacted] the words perishable property different from their ordinary meaning, ~~it would~~ he intended to apply them to stock. There appears to be no intention to enlarge the meaning of the word. He seems rather to fear that this term might be construed to apply to his only negro and therefore he expressly excepts him from the operation of the term. It will be observed that different intentions are manifested in the 3rd & 4th clauses. The perishable property is a fund for the education of his boys and the hire and sale of Jack is to be their patri-

money in part to be divided among them when the youngest becomes of age. The third clause was intended to create a fund to school his boys. Now suppose Stephen Dugan had acquired fifty negroes after making the will, if those fifty negroes could pass under the terms used in the 3rd clause, they could not be sold & applied by the executor to any other purpose than to school them. This would be a fund to endow a college. How much would be needed to educate four farmers boys in a plain way? While in the 4th clause of his will he seems to intend that the proceeds of Jack's hire & sale shall be a start in the world for the boys when the youngest arrives to twenty one years, yet in fact he sells him in his life time. In so doing there was a manifest change of intention so far as his boys were concerned. He saw perhaps that it was not just to make them the entire recipients of his bounty and while he didn't change the will he effected his purpose by disposing of the property upon which the will was to operate. He acquires four other negroes after the date of the will & Toney he acquired only about 18 Months before his death; and he sells all except Toney. Toney was not born much less his property at the date of the will & having adeemed the legacy of Jack who is to say that he died not intend to die intestate as to Toney. Whether he intended it or not I say that such is the conclusion which the law will draw.

Justice forbids the conclusion contended for by the plaintiffs. The court must enlarge the well-understood meaning of the words "perishable property" to let the plaintiffs in. In this way by a great strain I may say by legal violence, the court gives a mans property to a part of his children to his boys

who are able to take care of themselves; which if the usual, ordinary, & legal meaning be affixed to the terms, the property goes to all his children & his widow without distinction of sex share & share alike.

Thos J Johnson Atty for Appellees

Jeremiah Dugan et al
Respondents.

agt.

Thomas R. Livingston
Appellant.

Statement of the case,
Points & Authorities
Thos Johnson
Atty for Appelt

Thos R Livingston &
C Manus & wife } Appeal from
against } Washington C Court
Jeremiah Dugan et als

This was a petition to the circuit Court of Washington by the appellees to recover the possession of negro named Taney

The circuit Court gave judgment in favor of the petitioners

The plaintiffs below claimed title under their fathers will. which gave all the balance of his perishable property excepting his negro boy Jack to the plaintiffs

Taney the slave in controversy was purchased after the execution of the will and before his death. At the making of the will Jack was the only slave he owned. He was sold in his the testators life time.

Livingston claimed title by virtue of a bill of sale from Catharine Dugan the widow of the testator

Manus and wife applied to the court to become parties after the commencement of the suit on the ground of interest. The wife of Manus was a daughter of the testator and by the will had been given five dollars.

Catharine Dugan, the widow of the testator never renounced the provision of the will. She had been liberally provided for by the will according to the means of the testator. He had given her the farm with all the necessary stock during her life. He owned but the one farm and he followed farming as his principal occupation.

For the defendant in error it is insisted that it was the intention of Stephen Dugan the testator to dispose of all his property by his will

That the intention is sufficiently clear from the wording of his will

The 3d clause of the will shows what the testator understood by perishable property. It is the same that lawyers would call personal property From the perishable property he excepts the slave Jack which was all the slave property he then owned.

It is fair to infer that he would have classed Toney in the same manner he did Jack among his perishable or personal property. He may or or may not have reserved him from sale if he had owned him at the time of making his will. His executor in his construction of the will reserved Toney from sale. Whether he did right or wrong in so doing is not material in this case

We think that upon a fair construction of the will Toney should be considered perishable property in the language of the will and pass to the defendants in error by the third clause or should pass to them by the 4th clause of the will which gives Jack and his kine to them.

If the property in Toney did not pass by one or the other of these clauses then all of Dugans property did not pass by the will. and Toney

would pass to the heirs at law.

This last construction would be at war with the provisions of his will in reference to his daughter Matilda beyond all question. And it would also serve to defeat the intention of the testator so far as it modified the disposition of his property.

M Frifall atty
for J Dugan & others
defendants in error

Thos R Livingston &
E Manus & wife
against
Jeremiah Dugan
and others

Defendant's in error
Statement of facts &
Brief
M Tripell atty